UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL SHONE,		)
		)
	Petitioner	)
		)
v.		) Civil No. 03-191-B-W
		)
STATE OF MAINE,		)
		)
	Respondent	)

RECOMMENDED DECISION ON 28 U.S.C. 2254 PETITION

Petitioner Michael Shone, convicted in the State of Maine of numerous motor vehicle charges, brings this petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. (Docket No. 1.) I now recommend that the court **DENY** the petition.

Background

In 1999 Michael Shone was involved in four separate motor vehicle incidents spanning two southern Maine counties, York and Cumberland: April 10 (Cumberland County, April 16 (York County), December 11 (York County), and December 25 (conduct in both York and Cumberland County). Shone pled guilty to charges arising from each of the episodes and was separately sentenced pursuant to plea agreements in each county. Shone did not contend then, and he does not assert now, that he is not guilty of any of the charges brought against him. Rather, Shone complains that he did not receive effective assistance of counsel during the plea process and that his constitutional rights were thus violated. He also attempts to resuscitate in this court a stand alone claim of double jeopardy in connection with charges in York and Cumberland counties relating

to the December 25, 1999, episode. The State, in the first twenty-two pages of its response, has provided a careful summary of each count arising from each episode, the resulting judgment and sentence, and the attendant appellate and state post-conviction activities. I will not repeat that replete procedural history here, but the bare essentials are summarized below.

1. April 10, 1999, Motor Vehicle Accident in Cumberland County

On April 10, 1999, then twenty-two year old Michael Shone was involved in a motor vehicle accident in South Portland. He was indicted for three crimes (see PORSC-CR-1999-931), the most serious being a charge of operating after habitual offender revocation while having a prior operating under the influence charge. This is a Class C crime having a maximum potential penalty of five years of imprisonment. 17-A M.R.S.A. § 1252 (2)(C). On August 20, 1999, he was sentenced on these matters to 364 days in the custody of the Department of Corrections, all but thirty days suspended with two years of probation and a $1,000 fine on the most serious charges.

On December 30, 1999, a (second) motion for probation revocation[1] was filed on his August 20 sentence, alleging conduct that forms the basis of the December 11 and the December 25, 1999, motor vehicle charges discussed below. On June 29, 2000, Shone's probation was revoked and he was ordered to serve the remaining eleven months of his sentence concurrent with the sentence of two years of imprisonment he received in connection with the December 11 and December 25 motor vehicle incidents in Cumberland County (PORS-CR-2000-466) and consecutively to the sentences he received in connection with the April 16 and December 25 motor vehicle episodes in

[1] The first motion for revocation had been filed earlier in the month and alleged other criminal conduct in October, 1999, that has nothing to do with the motor vehicle episodes that are the basis of this petition.

York County (ALFSC-CR-1999-738 and 2000-95). Shone is now held in custody by the State of Maine in execution of the sentence imposed in this case and in PORSC-CR-466, having completed the sentences imposed in the York County matters.

Attorneys Michael Scott and Andrew Bloom of the Boulos Law Firm represented Shone throughout these proceedings. No direct appeal was ever taken in connection with the probation revocation or the underlying judgment.

2. April 16, 1999, Motor Vehicle Incident in Saco

These motor vehicle charges, similar in nature to the April 10 incident, resulted in a July 9, 1999, indictment being returned by the York County Grand Jury. (See ALFSC-CR-99-738). Once more, the maximum potential sentence was five years of imprisonment. Attorney Michael Scott represented Shone on these charges as well. On March 24, 2000, (approximately three months prior to the Cumberland County sentence on PORSC-CR-1999-931), the presiding justice sentenced Shone to concurrent straight terms of four years of imprisonment with no probation on these charges and on the December 25, 1999, York County charges (ALFSC-CR-2000-95). In what the State apparently views as an unauthorized departure from required procedure under State law, the sentencing court "discharged" the mandatory minimum fines required by statute. (See State's Resp. at 9 n.8). Shone filed timely notices of appeal from both of these convictions and also applications to allow appeal of his sentences. His direct appeals were dismissed because he neither filed his brief nor responded to the State's motion to dismiss the appeal. His application to allow an appeal of his sentence was denied by the Law Court on December 19, 2000.

Michael Scott of the Boulos Law Firm was attorney of record throughout these proceedings.

3. December 11, 1999, Motor Vehicle Incident in Scarborough

While on probation for the April 10 motor vehicle offense, Shone took his grandfather's Cadillac without permission, operated it at a reckless rate of speed while under the influence of intoxicating liquor and while under revocation. Ultimately, he became involved in a motor vehicle accident, causing serious injury to an innocent third party and totaling that person's car. On March 31, 2000, a five-count information was filed against Shone in Cumberland County as a result of this December 11 incident. (See PORSC-CR-2000-466). Attorney Andrew Bloom of the Boulos Law Firm appears as attorney of record in this case. Shone pled guilty to these charges and was sentenced on June 29, 2000, at the same time as he was sentenced on the probation revocation. The sentence in this case ran concurrent with that revocation and as indicated above, both of these sentences were consecutive to the York County cases. Shone was sentenced to five years of imprisonment with all but two years suspended, followed by four years probation, with various conditions. The sentencing justice also imposed the mandatory fine in its entirety, fees, and surcharges. No direct appeal was ever taken from this judgment.

4. December 25, 1999, Motor Vehicle "Episode" in both York and Cumberland Counties

On December 25, 1999, again while under the influence of intoxicating liquors, Shone stole a vehicle in Portland (Cumberland County) and drove the stolen vehicle into York County. He was observed operating the vehicle, refused to stop for a law enforcement officer, and a high-speed chase ensued. Eventually, Shone left York County

and drove the vehicle back into Cumberland County, once more attempting to elude police officers. The pursuit ended in South Portland when the stolen vehicle became disabled. Shone was charged in York County with two Class C crimes and operating under the influence. (See ALFSC-CR-2000-95, discussed above in conjunction with Saco incident and sentence imposed on March 24, 2000.) He received a sentence of four years of straight imprisonment, concurrent with the sentence in ALFSC-CR-1999-738. Michael Scott of the Boulos Law Firm again appears as attorney of record.

As with the other York County case, a direct appeal was taken but not pursued by Shone and it was ultimately dismissed by the Law Court.

The Cumberland County aspect of this episode resulted in separate criminal charges. (See PORSC-CR-2000-466). Those charges were the last two counts of the information filed on March 31, 2000, and discussed above in connection with the December 11, 1999, incident in Scarborough. On these charges Shone likewise received a sentence of five years with all but two years suspended followed by four years probation and, additionally, he was ordered to pay all mandatory fines, fees, and surcharges, and restitution. Attorney Andrew Bloom of the Boulos Law Firm appears as attorney of record. As indicated under the December 11 incident, no direct appeal or leave to appeal sentence was ever taken in conjunction with this information.

5. The State Post-conviction Process

On February 23, 2001, Shone filed a state post-conviction petition in York County. Retained counsel appeared on his behalf. The petition identified the criminal judgments in ALFSC-CR-1999-738 and ALFSC-CR-2000-95 as the convictions sought to be vacated, but the actual allegations appeared to relate to PORSC-CR-2000-466.

Counsel met with the court in conference, and as a result of that conference an order issued giving petitioner until January 25, 2002, to move to amend his York County petition and to seek a change of venue to Cumberland County. Rather than proceed in that fashion, Shone filed a "new" petition in the Cumberland County Superior Court on February 13, 2002.[2]

On July 25, 2003, Maine Superior Court Justice Thomas Warren issued an order denying post-conviction relief, containing within it a thorough analysis addressing the five ineffective assistance of counsel claims raised by Shone's post-conviction counsel. Those five claims included claims that trial counsel failed to provide effective assistance because: (1) they failed to pursue the double jeopardy issue in the context of the convictions in both York and Cumberland Counties stemming from Shone's conduct on December 25, 1999; (2) counsel failed to file a motion to change venue of the December 25, 1999, Cumberland County charge; (3) counsel did not use Shone's medical records to argue for a more favorable disposition at the Cumberland County sentencing; (4) counsel should have raised the issue of Shone's inability to pay any fines, fees, or

[2] The State does not concede that this current federal challenge to the Cumberland County conviction is timely. The State does concede that if the petition filed in York County on February 23, 2001, served to toll the applicable statute of limitations on the Cumberland County case as well as the York County case, then petitioner's plea to this court would be timely. The State refuses to grant this concession as to the federal petition because Shone was represented by retained counsel throughout the first stages of the state post-conviction process and counsel presumably should have known better. Section 2244(d)(2) of title 28 excludes from the federal one year statute of limitations any time during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2254(d)(2) (emphasis added); see Artuz v. Bennett, 531 U.S. 4 (2000). I think that the rule adopted in the Seventh Circuit relating to these sorts of timeliness concerns can be easily applied to this case. If the State decides during its post-conviction process not to enforce its own timeliness rules, and considers on the merits a petition that could have been dismissed as untimely, the petition should be treated as properly filed for purposes of § 2244(d)(2). See Brooks v. Walls, 279 F.3d 518, (7th Cir. 2002). Shone was sentenced on the Cumberland County matter on June 29, 2000, and never filed an appeal. The "amended" state post-conviction petition was filed on February 13, 2002, and considered on its merits, obviously treated as timely under the Maine's one-year statute of limitations. 15 M.R.S.A. § 2128 (5). The only way for the petition to be considered as timely under Maine's statute would have been to allow the York County petition to toll the limitations period. If the period was tolled for purposes of the applicability of the state statute of limitations, I will likewise consider it to have been tolled for the purposes of § 2244(d)(2).

surcharges at the Cumberland County sentencing; and (5) counsel were ineffective because they did not fully advise him about his right to enter an "open plea" as to the charges against him.

Shone filed a timely notice of appeal from the judgment on his post-conviction pleading. The Law Court, through Associate Justice Rudman, denied Shone a certificate of probable cause to proceed with the appeal, effectively terminating State review of this matter.

Discussion

In this court Shone now attempts to raise four separate grounds claiming he is entitled to post-conviction relief. Three of the grounds mirror three of the ineffective assistance claims raised in state court and fully considered by Justice Warren: Shone again claims that his counsel provided ineffective assistance by failing to request a change of venue; failing to present medical records and testimony at the time of sentencing; and failing to request waiver of fines and fees because of Shone's indigency.

Justice Warren appropriately applied law that was consistent with the governing federal law to these claims of ineffective assistance of counsel in the context of a guilty plea. See Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985); see also McCambridge v. Hall, 303 F.3d 24, 36 (1st Cir. 2002) (in a case where state precedent was relied on in the state proceedings and Supreme Court precedent not actually cited, providing that what is necessary is that the state court applied the proper rule of law). According to Justice Warren the request to change venue would have been a nonstarter given that the respective prosecuting attorneys in both York and Cumberland counties were opposed to the consolidation of the cases. Theoretically, the December 25

eluding charge -- with the attendant allegations that it was committed in more than one county -- could have been transferred over the prosecutor's objection. See Me. R. Crim. P. 21(b)(4). However, as Justice Warren noted, the December 11 incident was going to remain in Cumberland County and a change of venue regarding the December 25 charge would not have altered the outcome. Justice Warren was also satisfied that counsel acted prudently in not presenting Shone's mental health records at the time of sentencing because those records portrayed him as noncompliant and acting against medical advice. Finally, Justice Warren determined that in spite of Justice Brennan's earlier order in the York County case, there was no statutory authority to waive the fines in the first instance, and counsel's failure to seek such a remedy was not ineffective assistance.

This court's review of Justice Warren's adjudication of the merits of this claim is circumscribed by the statutory mandate of 28 U.S.C. § 2254(d):

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a [s]tate court shall not be granted with respect to any claim that was adjudicated on the merits in [s]tate court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). A state decision involves an "unreasonable application" if the state court identifies the correct

governing legal principle from a Supreme Court decision, but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The reasonableness test is an objective one; in making its decision, a federal court must "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 410-11; see also id. at 410 ("The term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning. For purposes of today's opinion, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law."). Justice Warren identified the correct governing legal principles and reasonably applied that principle to the facts of Shone's ineffective assistance claims. The ineffective assistance claims need no further elaboration than the discussion set forth in Justice Warren's order.

One final claim remains. Shone attempts to raise a "straight up" claim of double jeopardy with respect to his dual convictions in both York and Cumberland counties on the eluding charge. Justice Warren discussed this claim in the context of an ineffective assistance claim raised by Shone in state court. Justice Warren stated: "Whether double jeopardy applies is an interesting question." (Post-Conviction Order at 5.) However, in considering the ineffective assistance claim, the state court concluded that it did not need to resolve the issue because there simply was no reasonable probability that Shone's Cumberland County sentence would have been any different in the absence of the eluding count. To the extent that this court recasts Shone's Double Jeopardy claim as a claim of ineffective assistance, obviously Justice Warren's analysis is unassailable under the 28 U.S.C. § 2254(d) standard vis-à-vis the application of the Strickland prejudice prong.

Shone's double jeopardy claim as a straight-up claim is not cued for § 2254 review in this court because he has not exhausted his remedies with respect to this claim as required by § 2254(b)(1)(A). The State contends that it is procedurally defaulted and that appears to me to be a fair reading of Maine law and procedure. It is clear that in state court Shone framed the issues surrounding the double jeopardy claim as an ineffective assistance plaint. (Pet.'s Mem. Support Request Certificate Probable Cause.) He did not even take a direct appeal from the Cumberland County eluding conviction and his York County direct appeal was dismissed when he failed to file a brief. It is clear that the straight-up claim of double jeopardy has never been properly presented for the state court's consideration. I am skeptical that this is the kind of unexhausted claim that would warrant heeding the Supreme Court's directive "to dismiss a petition for a writ of habeas corpus containing any claims that have not been exhausted in the state courts." Rose v. Lundy, 455 U.S. 509, 510 (1982). However, I am not troubled by the question as "[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). The prejudice standard for ineffective assistance of counsel claims (that Shone failed to demonstrate to the satisfaction of the post-conviction court) is the same as the prejudice standard that must be met to excuse for procedural defaults. Prou v. United States, 199 F.3d 37, 49 (1st Cir. 1999). I am satisfied with the state court's analysis on this score and recommend that the Court deny Shone relief on this claims pursuant to § 2254(b)(2).

Conclusion

For these reasons I recommend that the Court **DENY** Shone's 28 U.S.C. § 2254 petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

February 19, 2004.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00191-JAW
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SHONE v. WARDEN, MAINE STATE PRISON et al
Assigned to: JUDGE JOHN A. WOODCOCK JR.
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Demand: $
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

Date Filed: 11/07/03
Jury Demand: None
Nature of Suit: 530 Habeas Corpus (General)
Jurisdiction: Federal Question

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